D.P.U. 89-189

Investigation by the Department of Public Utilities into the matter of a complaint of over twenty customers, regarding payments by the Peabody Light Commission to the City of Peabody.

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I. INTRODUCTION

On March 1, 1989, pursuant to G.L. c. 164, § 69,[1] a group of twenty or more individual ratepayers ("Petitioners") filed with the Department of Public Utilities ("Department") a complaint requesting an investigation regarding payments in lieu of taxes made by the Peabody Municipal Light Commission ("PMLC") to the City of Peabody ("Peabody") and the rates charged by the PMLC for residential service and street lighting.[2] The PMLC is the governing board of the Peabody Municipal Light Plant ("Plant"). The Plant is a municipal lighting plant organized under and operating pursuant to the provisions of G.L. c. 164, §§ 34-69F, inclusive. The complaint was docketed as D.P.U. 89-189.

Pursuant to notice duly issued, a public hearing was held on February 5, 1990 at the Department's offices to afford interested persons an opportunity to be heard. At the hearing, Bruce P. Patten, manager of the Peabody Municipal Light Plant ("Plant"), gave testimony on behalf of the Plant and the PMLC. Stefano Picciotto acted as spokesperson for the Petitioners. The Department granted the petition of Municipal Electric Association of Massachusetts ("MEAM") for leave to file an amicus curiae brief. MEAM filed an amicus curiae brief on March 5, 1990. The PMLC did not file a brief but stated it would rely on

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1 While G.L. c. 164, § 69 provides that the supreme judicial court where the town is situated shall have jurisdiction on petition of twenty taxable inhabitants of the town, the Department of Public Utilities is given substantial power to supervise municipally owned utilities and to afford relief in the first instance before seeking relief in the courts, if warranted. See Holyoke Water Power Company v. Holyoke, 349 Mass. 442, 446 (1965).

2 Although the Petitioners indicate that the complaint was filed on behalf of ten or more ratepayers, the Department notes that the complaint is supported by the names of twenty-one ratepayers and, therefore, satisfies the requirements of G.L. c. 164, § 69.

the brief filed by MEAM (Tr. at 66).[3] The evidentiary record includes 33 exhibits including 28 responses to information requests of the Department. At the hearing, the Department incorporated by reference, pursuant to 220 C.M.R. § 1.10(3), the PMLC's Annual Returns for 1986, 1987, and 1988 (Tr. at 48). In addition, the Department hereby incorporates by reference, pursuant to 220 C.M.R. § 1.10(3), the PMLC's Annual Returns for 1989, 1990, 1991, and 1992.

II. POSITIONS OF THE PARTIES

A. Petitioners

The Petitioners allege that the PMLC is budgeting and paying $40,000 per month to Peabody, in lieu of taxes and under the guise of "municipal services" (Petitioners' Complaint). The Petitioners further allege that the PMLC is selling electricity for street lighting to Peabody "at cost" resulting in a net savings to Peabody in excess of $200,000 per year (id.). The Petitioners concede that a municipal light commission may turn over excess profits to a city (id.). However, the Petitioners contend that because of a "bad investment" in Seabrook Nuclear Power Plant ("Seabrook"), the PMLC will realize a loss of over $10,000,000 in the year 1989 alone (id.). The Petitioners argue that given the Seabrook losses, the PMLC is not in a position to declare a profit (id.).

The Petitioners further allege that any profit achieved by the PMLC is a result of the PMLC's unfairly boosting the rates (id.). The Petitioners argue that PMLC's rate is almost double that of Massachusetts Electric Company's ("MECo") rate per kilowatthour ("KWH")

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[3] PMLC and MEAM will be referred to collectively as "Respondents."

(id.). The Petitioners argue that the Plant is purchasing power from the same source as MECo and, therefore, should sell it at the same price (Tr. at 3).

B. Respondents

The Respondents argue that since 1986, the Plant has transferred $480,000 annually to Peabody and that in each of those years the Plant experienced net income in excess of $480,000 (MEAM Brief at 4). The Respondents further argue that those payments were appropriate based on statutes, case law and Department precedent (id.). In support, the Respondents state that the Supreme Judicial Court of Massachusetts has held that G. L. c. 164, §§ 55, 56 provides for the operation of a commercial electric business by a municipal lighting plant manager under local control and that this control in Peabody has been placed in the municipal lighting commission (id. at 4-5, citing Municipal Light Commission v. City of Peabody, 348 Mass. 266 (1964)). The Respondents also state that G.L. c. 164, § 56 places unrestricted power in the municipal lighting plant manager and commission and contains an implication that their determination as to what should be expended for the efficient operation of the business is not subject to change by other public officers or the legislative department (id. at 5, citing Municipal Light Commission of Taunton v. Taunton, 323 Mass. 79, 80 (1948)).

The Respondents further contend that since at least 1974 the Department has consistently allowed municipal lighting plants to make voluntary transfers, and has specifically advised that the amount of such transfers is to be made in the sole discretion of the light plant manager and light board, provided the payment is equal to or less than the profit or net income experienced by the municipal lighting plant during the fiscal year (id.

at 5-6). In support, the Respondents rely on a February 28, 1974 letter from the Department's chief accountant to the manager of the City of Holyoke, Gas & Electric Department which states that the "Department has always regarded payments in lieu of taxes to be permissible if the light department shows a profit and they are only payable out of profits and can only be made if the cash to make the payment is available" (id. at 6, Exh. A).

Finally, the Respondents contend that Department precedent supports their position that the decision to transfer excess amounts of income, or any portion thereof, is the responsibility of the municipal light commission (id. at 6, citing Peabody Municipal Light Commission, D.P.U. 86-16, at 3 (1986); Reading Municipal Light Department et al., D.P.U. 85-121/85/138/86-28-F at 16 (1987)). Thus, the Respondents argue that the full charge of the operation of the Plant is in the manager and the PMLC, including the discretion of choosing whether to make a voluntary transfer and the amount of any transfer made by the Plant to the City and that inasmuch as all voluntary transfers made by the Plant have been less than the Plant's net income, each transfer made by the Plant has been appropriate (id. at 7-8).

III. ANALYSIS AND FINDINGS

The Petitioners complaint raises three issues: (1) whether the budgeted payments in lieu of taxes made by the PMLC to Peabody are appropriate; (2) whether the PMLC is charging the residential customers an excessive rate; and (3) whether the PMLC is not charging Peabody an appropriate rate for street lighting.

A. Payments In Lieu of Taxes

G.L. c. 164, § 55 provides that a town which has established or votes to establish a gas or electric plant may elect a municipal light board. The powers of such boards are specified in such section to be "authority to construct, purchase, or lease a gas or electric plant in accordance with the vote of the town and to maintain and operate the same." G.L. c. 164, § 55. It is the duty of the mayor of the city, or the selectmen or the municipal light board to appoint a manager, who, subject to the discretion of the mayor of the city, or the selectmen or the municipal light board and the provisions of the statutes, shall "have full charge of the operation and management of the plant, the manufacture and distribution of gas or electricity, the purchase of supplies, the employment of agents or servants, the method, time, price, quantity and quality of the supply, the collection of bills, and the keeping of accounts." G.L. c. 164, § 56. Thus, the management and operation of the plant is in the board by virtue of G.L. c. 164, § 55, and in the manager acting under them as their executive officer by virtue of G.L. c. 164, § 56. See Commonwealth v. Oliver, 342 Mass. 82, 85 (1961), citing Whiting v. Mayor of Holyoke, 272 Mass. 116, 119-120 (1930); Municipal Light Commission of Taunton v. Taunton, 323 Mass. 79 (1948). Moreover, the Supreme Judicial Court of Massachusetts has held that the management and fiscal operation of the municipal light department of Peabody are vested in the commission and the manager of the plant under St. 1951, c. 286, and G.L. c. 164. Municipal Light Commission of Peabody v. Peabody, 348 Mass. 266, 269 (1964). However, the actions of the municipal light commission and manager are subject to the supervision of the Department. See Holyoke Water Power Company v. Holyoke, 349 Mass 442, 446 (1965); Municipal Light

Commission v. Taunton, 323 Mass. 79, 83 (1948).

In the present case, the residents of Peabody elected the members of the PMLC for a six-year term (Exh. DPU-1). The PMLC has designated a manager of the Plant (Tr. at 10). Mr. Patten testified that, as manager of the Plant, he oversees the day-to-day operations of the business, including power supply contracts, union contract negotiations, budgetary management, and all financial aspects of the operation. Therefore, the Department finds that the PMLC and the manager, acting under the PMLC, have full charge of the Plant, subject to the Department's supervisory authority.

Mr. Patten testified that the PMLC is budgeting and transferring $40,000 per month to Peabody (Tr. at 17). He further stated that the amount budgeted and transferred represents excess income from the prior year and that the PMLC would not transfer the budgeted amount if a profit were not realized (id. at 17, 39). Mr. Patten testified that prior to 1987, the Plant's books closed at the end of the calendar year and the PMLC would then determine the amount of excess funds that could be given to Peabody in lieu of taxes (id. at 11). He further testified that about 1987, the Plant, in response to a request of the mayor of Peabody, altered its system by making monthly payments in lieu of taxes to Peabody, if possible (id.). Mr. Patten stated that the mayor's request was prompted by the bond rating agencies' request for some type of consistent revenue stream relative to the in lieu of tax payments rather than a lump sum amount (id.). Mr. Patten testified that the altered system allowed the PMLC to better manage its cash flow than the one payment system (id. at 18).

There is no provision in G.L. c. 164 which creates an obligation on the part of municipal light plants to transfer excess income to a town or city, nor do the applicable sections refer specifically to how municipal light plants are to manage excess income generated during a fiscal year. The Department considered this matter in 1961 when it issued the Uniform Systems of Accounts for Electric Companies. In the supplement to that document, which pertains to municipal lighting plants, the Department stated:

> If there is any excess income over current expenses (including, as required by the statute, depreciation, interest and maturing debt requirements), such excess or profit may be left in the business, or returned to the town treasury, to be used, like other municipal receipts, for the relief of general taxes. If left in he business it should be used in the succeeding year for extensions and additions, to that extent relieving the city or town from the necessity of making additional appropriations or incurring debt for that purpose.

Uniform System of Accounts for Electric Companies, Supplement at 165.

The Department found transferring excess income to a city appropriate in Peabody Municipal Light Department, D.P.U. 86-16 (1986). There, the Department held that the decision to transfer excess amounts, or any portion thereof, is the responsibility of the municipal light commission. Peabody Municipal Light Plant, D.P.U. 86-16, at 3 (1986). The Department noted that it anticipates that a municipal light commission will demonstrate reasonable and prudent management discretion in determining an amount to be transferred. Id. at 4.

Therefore, the issue arises as to whether the Plant has generated excess income during the 1988 fiscal year to support the PMLC's decision to budget and transfer $40,000 per month, or $480,000 per year, to Peabody. There is evidence in the record to support the PMLC's contention that it had realized a net profit in 1988 (Exhs. DPU-3, DPU-5). A review of the Plant's 1988 Annual Return indicates a net income amount of $3,408,907 for fiscal year 1988, which is in excess of the $480,000 budgeted as municipal services paid to

Peabody (See also Exh. DPU-5). Thus, the Department finds that the PMLC's transfer to Peabody of $480,000 from excess income appropriate.

The Petitioners also question the PMLC's practice of including a profit estimate in the budget to be transferred to Peabody. The budget of the light department is to be determined in accordance with G.L. c. 164, § 1 et seq., governing the operation of a commercial business. Municipal Light Commission of Peabody v. Peabody, 348 Mass. 266, 269 (1964). There are no Department requirements relating to budgets, but the Department expects that a municipal light plant's budget will follow the Department's Uniform System of Accounts for Electric Companies, 220 C.M.R. § 51.00 et seq.. However, G.L. c. 164, § 58 requires that prices charged by a municipal light company not yield revenues in excess of operating expenses, depreciation, interest on debt and an eight percent return on the cost of plant. Thus, the PMLC could include up to eight percent of the cost of the plant in its net profit estimate in a properly prepared budget. In the 1989 budget, the PMLC's rate of return estimate appears to be eight percent (Exh. DPU-24A). The fact that the payments are made on a monthly basis, after a profit is determined, is inconsequential if the cash management procedures followed by both Peabody and the PMLC make it more convenient to do so. Therefore, the Department finds that the practice of budgeting $40,000 per month under the category of municipal services, to be used as in lieu of tax payments, is a reasonable exercise of management discretion.

B. Rate Considerations

1. Residential Rate

Petitioners assert that the PMLC has set the Plant's rates too high in comparison with those of neighboring communities served by other utilities. Petitioners further allege that the Plant obtains power from the same sources as MECo and, therefore, the rates should be similar to those of MECo. Mr. Patten testified that the disparity in rates between the Plant and other investor-owned utilities such as MECo results, in part, from (1) different sources of power; and (2) the relative costs of Seabrook (Tr. at 19-20). Mr. Patten stated that the Plant has many sources of power which do not supply MECo and vice versa (id. at 19). Further, Mr. Patten explained that the PMLC was paying each year for Seabrook and was not receiving any power in return since Seabrook was not yet operational (id.). The costs of the Seabrook power, though not received, are passed on to the ratepayers (id.). Investor-owned utilities, such as MECo, may not pass on costs of power to their ratepayers until the plant is operational. See, Western Massachusetts Electric Company, D.P.U. 85-270, at 20-27 (1986). Mr. Patten testified that when Seabrook becomes operational and the Plant receives its share of the energy for the amounts paid under the power contract, one can expect the rates to decrease (id. at 19).

Rates set by municipal light departments do not require the same level of scrutiny or supervision as required with nonmunicipal electric companies since the rates are fixed by public officers acting under legislative mandate. Bertone v. Department of Public Utilities, 411 Mass. 536 (1992); Board of Gas and Electric Commissioners of Middleborough v. Department of Public Utilities, 363 Mass. 433 (1973). The municipal light department's discretion, however, is circumscribed by the rate design restrictions in G.L. c. 164, § 58[4] as

[4] G.L. c. 164 § 58 provides, in part, that prices charged by a municipal light company not (continued…)

well as the Department's supervisory power to review such rates as set forth by G.L. c. 164, § 94. Bertone, 411 Mass. 536, 548 (1992).

A review of the responses to the information requests as well as the annual returns filed by the Plant with the Department indicates that the calculation of the Plant's rate of return for the years 1986, 1987 and 1988 was 2.59 percent, 2.19 percent and 11.00 percent, respectively (See Schedule I, attached). Mr. Patten conceded that the rates in effect in 1988 produced a rate of return in excess of the statutory eight percent but stated that the projected rate of return for 1989 and thereafter would be much lower (Exh. DPU-28). The Department notes that the Plant's Annual Returns for the years 1989 through 1992 indicate that the rate of return has been at or significantly below the statutory limit of eight percent for those four years (See Schedule I, attached). Since the rates established by the PMLC produced a rate of return in 1989 through 1992 which is within the statutory limit of eight percent, the Department finds the rates charged in those years to be reasonable.

The PMLC, however, established rates in 1988 which produced a rate of return in excess of the statutory limit. While G.L. c. 164, § 63 makes no provision for penalties for a municipal lighting plant's violation of the G.L. c. 164, § 58, the Department may petition the Supreme Judicial Court to compel the fixing of rates in compliance with G.L. c. 164, § 58. In light of the length of time that has elapsed since the violation and the fact that the PMLC has remedied the situation in the succeeding years, the Department will not pursue

[4](...continued)
yield revenues in excess of operating expenses, depreciation, interest on debt and an eight percent return on the cost of plant.

this matter. The Department, however, reminds the PMLC that it is obligated to comply with the statutory limit regarding the rate of return, and that the Department may petition the Supreme Judicial Court to enforce compliance with G.L. c. 164, § 58.

2. Street Lighting

The price for electricity sold by municipal lighting plants shall be fixed at no less than production cost as it may be defined from time to time by the Department, unless upon written consent of the Department. G.L. c. 164, § 58. Further, G.L. c. 164, §58 provides a formula for the determination of a cost to be charged for electricity used by a municipality for street lighting. The Department has compared the street light revenue received from Peabody in the 1988 Annual Return ($224,847.79 on page 22, line 14) with a calculation of the statutory formula using costs from the 1987 Annual Return ($218,201.20), while recognizing that the costs for a particular year are not known until the end of that year and therefore can not be expected to exactly match the revenues realized from a rate established for use during the particular year. This comparison indicates that the $224,847.79 in revenue generated by the street lighting rate did not fall below the $218,201.20 of cost to be charged according to the statutory formula. With regard to the Petitioners argument that rates charged Peabody for electric street lighting results in a savings to Peabody of $200,000, the Department finds the appropriate review of such rates is compliance with the statutory requirements and not a comparison with the rates established by neighboring utility providers. Thus, the Department finds that the rate charged Peabody for street lighting by the PMLC is in compliance with the statutory requirements.

III. Order

Accordingly, after due notice and consideration, it is

ORDERED: That the Department's investigation of the Peabody Municipal Light Commission in D.P.U. 89-189 be and hereby is closed.

By Order of the Department,

Kenneth Gordon
Chairman

Barbara Kates-Garnick
Commissioner

Mary Clark Webster
Commissioner

Appeal as to matters of law from any final decision, order or ruling of the Commission may be taken to the Supreme Judicial Court by an aggrieved party in interest by the filing of a written petition praying that the Order of the Commission be modified or set aside in whole or in part.

Such petition for appeal shall be filed with the Secretary of the Commission within twenty days after the date of service of the decision, order or ruling of the Commission, or within such further time as the Commission may allow upon request filed prior to the expiration of twenty days after the date of service of said decision, order or ruling. Within ten days after such petition has been filed, the appealing party shall enter the appeal in the Supreme Judicial Court sitting in Suffolk County by filing a copy thereof with the Clerk of said Court. (Sec. 5, Chapter 25, G.L. Ter. Ed., as most recently amended by Chapter 485 of the Acts of 1971).